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United States

Term

No. 353

R. G. BARRY CORPORATION

vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SIXTH CIRCUIT

Petitioner, R. G. Barry Corporation, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in case number 18,510 on February 19, 1969.

OPINION BELOW

The Court of Appeals did not deliver an opinion in this case, and its Order enforcing the National Labor Relations Board's Order (Appendix C, infra, pp. 43-44) is unreported. The Decision and Order of the National Labor Relations Board and the Trial Examiner's Decision (Appendix B, infra, pp. 3-41) are reported at 162 N.L.R.B. No. 135.

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit, which constitutes the judgment sought to be reviewed (Appendix C, infra, pp. 43-44) was filed on February 19, 1969, and is otherwise undated.

Under date of May 9, 1969, the United States Supreme Court entered an order (Appendix E, infra, p. 47) extending the time for filing this petition through July 19, 1969.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit has, in conflict with applicable decisions of this Court, and in conflict with the decisions of other Courts of Appeal, interpreted the National Labor Relations Act, Sec. 8(a)(1) (29 U.S.C. Sec. 158(a)(1)) so as to preclude an employer when talking to his employees about unionization, from making any statement which might reasonably cause an employee to fear that unionization might affect him adversely rather than beneficially, regardless of the absence of any threat or promises in the words spoken.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et. seq.) are set out verbatim in Appendix D, infra, pp. 45-46.

STATEMENT OF THE CASE

The United States Court of Appeals for the Sixth Circuit was the federal court of first instance in this matter, and its jurisdiction was invoked pursuant to Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. 160 (e)), when the National Labor Relations Board filed its petition for enforcement of its order against Petitioner.

The case originally arose in the context of an ordinary union organizing drive at the Petitioner's plant at Columbus, Ohio (Appendix B, infra, pp. 9-10).

Seeking to organize the Petitioner's employees, the Textile Workers Union of America engaged in an intensive campaign effort, making some seven hundred personal visits to the employees' homes and propagandizing by mass mailings of letters on several occasions, a telephone solicitation campaign, the use of an in-plant organizing committee for continuous solicitation on the job, and the holding of a series of ten to twelve meetings with the employees (Appendix F, infra, pp. 151, 152, 153, 155).

The Petitioner's vice-president was charged with unfair labor practices on account of one talk that he made in response to this campaign.

The vice-president, Mr. Gordon Zacks, invited the employees, ten to twelve at a time, to come to one of the employee lunchrooms if they wished to hear the com-

pany's side of the matter. The supervisors were instructed to tell the employees who was speaking, what the subject would be, and that they were invited but not ordered, to attend (Appendix F, pp. 66-67). Mr. Zacks also testified, and it was found, that the employees were told at the meeting itself that they were free to leave at anytime, either before or during the meeting (Appendix F, infra, p. 68; Appendix B, infra, p. 14).

The Board's employee witness Barbara Blevins testified that she went to Mr. Zacks' meeting because she had already been to the union's meetings, and she wanted to hear both sides, and hear what the company had to say (Appendix F, infra, p. 112).

At each meeting, Mr. Zacks read his remarks, without deviation, from a prepared text (Appendix B, infra, p. 14). The entire talk is reproduced as Appendix G herein.

The Board's trial examiner, the Board, and the Court of Appeals have found that Mr. Zacks threatened to reduce wages and to make working conditions more difficult in the event of unionization by the following remarks:

> "Too many people here at Barry are under the definite mistaken belief that if the union wins the election that the very next day there is going to be a contract signed containing all these promises that the Union has been making. Well, that's not the way this thing works at all. You sit down and you start bargaining and talking about how many holidays are we going to give, what's the vacation policy, what are the fringe benefits going to be. We don't necessarily start from where you are now and try to talk up — the only obligation that the law imposes on us

about bargaining and negotiating a contract is to bargain in good faith and only legal obligation concerning wages is to pay $1.25 per hour. We certainly don't mean to imply that we will go back to $1.25. We are merely pointing out our legal obligations. So you see you might end up with more but you might end up with less. And when that union comes in and when we sit down and negotiate you put all the things that you now have and your current wage program right out there on the table and we bargain about them. If they are not agreed to and if they are not included in the contract you may not have them. * * *

* * * * Why is my family and I — why are we opposed to a union coming into Barry. Well, the reason that we are opposed to this union coming in here is not that we are afraid of the union or afraid of what the union can get from us — believe me they can't get any more for you than you can get for yourself by coming in here and talking to me man to man. But we are opposed to this union because we might lose the flexibility that we now have. We have a lot of flexibility in this operation right now. Under a union contract we might not have this flexibility. If we didn't have a job for you we couldn't transfer you to other work as we do. We might have to send you home. We might have to lay you off. In the past we've traded work for you to avoid layoffs and tried to provide instead year round employment, the union might demand that we lay off and hire somebody else on the other job. Because that means another $5 in monthly dues. Every

time we would do something like that we might have a grievance — every time we would do a thousand things for you that we do now, we might get involved in a grievance session and not only would we get involved in a grievance but we might end up in court. There are just so many things that could be completely changed and completely different here. But the primary reason that we are opposed to a union at Barry is because it could destroy the personal relationship that we have developed with each other. As I've said, you couldn't talk to me or my father or Bessie or your supervisor or anybody else about these matters — you would have to see the shop steward. A wall of separation could be built between us. We could be divided. We have grown and prospered together because we have worked well together. Because we have respected each other as individuals — we have different skills and different jobs — but we've been on the same team. * * * "

(Appendix B, infra, pp. 15-17).

Mr. Zacks is then found to have threatened that the company might go out of business if unionized by the following remark:

"My family has had a lot of fun out of building this business together. But to be very frank with you neither my father or mother or I would be interested in coming to work in a hostile atmosphere. There has been a lot of talk about profits. * * * We've had many chances to sell this business in the past but we didn't want to. We could sell this whole operation today but we don't

want to because my whole family gets a lot of fun out of this operation. I think you know that — I think you know that I get a lot of fun, a lot of bounce from this business and it gives me something to look forward to. In fact I'd get no kick out of quitting tomorrow and never working again. But we could sell this whole operation and take the cash that we get from it and put it in tax-free municipal bonds and we could come out with as much profit as we get from coming in here and enjoying these headaches. And I assure you that we do enjoy them. We like every problem that comes up every day. All we ask is the opportunity to continue in the future as we have in the past. We'd rather have our headaches together than clip coupons from municipal bonds. . . ."
(Appendix B, infra, pp. 18-19).

The trial examiner's decision, now approved by the Board and by the Court of Appeals, is that Mr. Zacks' remarks violated Section 8(a) (1) of the Act, not because they actually contain, expressly or by fair implication, any threat on the part of the Petitioner to engage in the retributive action described in the complaint, but because of the Petitioner's expressed opinion that union representation might, in net effect, be detrimental rather than helpful to the employees. The Decision clearly admits that Mr. Zack's plain words did not have the "definitive meaning" ascribed to them in the complaint, but asserts that these words were unlawful because they made the employees aware of the negative possibilities that might follow unionization and this implanted in their minds a fear of economic jeopardy if they accepted the union (Appendix B, infra, p. 20).

ARGUMENT

The Petitioner asserts that the writ requested herein should be granted because the Court of Appeals for the Sixth Circuit has rendered a decision, in a highly important area of the federal labor law, which is in conflict with the decisions of this Court and with the decisions of other Circuit Courts of Appeal, within the meaning and intent of Rule 19.1(b) of this Court's Rules.

Traditionally, the courts have held that an employer commits an unfair labor practice in violation of Sec. 8(a) (1) of the Labor Act if he attempts to dissuade employees from unionizing by the use of threats of reprisal or promises of benefits, either express or implied. Petitioner does not quarrel with this rule.

However, the Court of Appeals here holds that an employer violates the Act simply by discussing the negative possibilities connected with unionization in a frank and candid manner. If the employee, becoming aware of these negative possibilities, could reasonably apprehend that unionization might involve economic jeopardy, the employer has broken the law.

Such a construction of the statute effectively eviscerates Sec. 8(c) of the Act, in which Section the Congress sought to protect employers from unfair labor practice charges so long as they did not resort to threats of reprisal or force or promises of benefits in expressing their views, arguments and opinions on the question of unionization.

The Petitioner seriously questions the desirability of a statutory interpretation which tends to prevent the free and open discussion of all important issues prior to a representation election, and which tends to keep the voters in ignorance.

Unionization does in fact involve risk of economic loss to the employee, in one degree or another, depending on such variable facts as the cost of union dues and fees, the level of wages and benefits already in existence, the cost of labor in the open market, and the projected comparative strength of employer and union in the event of a strike. Many strikers, for instance, have lost their jobs completely by being replaced during economic strikes. Some states do, others do not, allow persons who voluntarily cease work in order to strike to collect unemployment benefits. An individual employee of high merit and value can often negotiate a better deal for himself than a union concerned with "across the board" rates will make for him. An employer who knows that he will be firmly held for a term of years to any wage agreement that he makes, regardless of interim developments affecting his ability to pay, is likely to be more cautious and less liberal than he would otherwise be.

Unionization may also involve risks that are not economic. Labor strikes are often emotionally charged and they carry the risk of violent happenings which are repugnant to many employees. Many employees also object to certain union customs and practices, such as the establishment of production ceilings and the prohibition against crossing picket lines.

These are but a few of the many reasons why various employees vote against union representation. The Petitioner asserts that a rule which prohibits the free discussion of such matters prior to an election is undesirable.

The Petitioner asserts that most employees are relatively ignorant of the crucial considerations in regard to unionization, and they, like the Board's witness Blevins, want to hear what both sides have to say (Appendix F, infra, p. 112).

Quite obviously, an organizing union will not dwell upon the negative aspects of unionizing, and the employee will likely be foreclosed from hearing this side of the question unless he hears it from the employer.

The Petitioner's vice-president here did not engage in the use of threats of reprisal or force or promises of benefits, and the decision approved by the Court of Appeals candidly admits that that "definitive meaning" does not appear in the plain language of his remarks (Appendix B, infra, p. 20). Rather, it is found that certain of the vice-president's remarks constituted threats of reprisal merely because he explained how adverse results could occur in the course of the give and take of negotiation in a unionized operation. The decision holds, as a matter of law, that to refer to these possibilities is to threaten to make them happen.

Thus, it is found that Zacks actually threatened to cut wages to the legal minimum, and to reduce employee benefits if required to bargain (Appendix B, infra, pp. 17-18), whereas his actual statement was that he did *not* mean to imply that any wage cut would occur, and

that the employees might end up with more or less after bargaining. The remarks in question are quoted at pp. 15-16 of Appendix B, infra.

In these remarks, Zacks stated that it was a mistake to believe that a contract embodying the union's promises would be signed the very next day after the election, but that the company and the union would bargain over these matters. His subsequent remarks related to the true fact there were no *guarantees* except the legal obligation to pay a minimum wage, and the obligation to bargain in good faith, and he ended by emphasizing that the employees would in the end wind up with, and only with, those wages and benefits agreed to in negotiations.

It is then found that Zacks threatened to make working conditions more difficult (Appendix B, infra, p. 17, fn. 3), when his actual remarks constituted nothing more than a plea in favor of flexibility in dealing with employee work assignments and grievances and against the rigidity of a union system of job classifications and formal grievance procedures (Appendix B, infra, pp. 16-17).

The decision approved by the Court of Appeals also finds that Zacks threatened that the company would go out of business if the union won the election, when his quoted remarks relate only to the possibility of the Zacks family retiring from the business (Appendix B, infra, pp. 18-19), but leaving it intact and in existence as a going concern.

The paragraph of Zacks' talk referred to in the decision at no point makes any reference whatsoever to a closing of the business itself, or to the loss of employee

jobs. The finding that Zacks threatened the employees with "uncertain job tenure" (Appendix B, infra, p. 19) is therefore wholly unwarranted.

The Petitioner submits that it is clear from the decision, and from what is said above, that the Board and the Court of Appeals are enforcing a rule of law under which an employer is precluded, not only from engaging in the use of threats and promises, but from engaging in any discussion from which an employee might become aware of the possibility that unionization could have a negative effect. Indeed, in the case of the "threat" to go out of business, the employer is precluded from raising any matter which might prompt an employee, thinking independently, to become aware of some other adverse possibility.

In either case the decision here is in conflict with the decisions of this Court, and with the decisions of other Circuit Courts of Appeal.

This Court has held, in *National Labor Relations Board v. United Steelworkers*, 357 U.S. 357 (1958), that the right of an employer to engage in non-coercive anti-union solicitation is affirmatively protected by the employer free speech provision of Sec. 8(c) of the Act. The limitation expressed in that statute and quoted with approval by this Court in the cited case is that the employer's expressions contain "no threat of reprisal or force or promise of benefits." In the absence of such threats or promises, this Court referred to the employer's expression of his anti-union views as being "legally authorized" (357 U.S. at 364).

Consistently, in *Linn v. United Plant Guard Workers of America, Local* 114, 383 U.S. 53 (1966), at page 62 of the opinion, this Court emphasized the Congressional policy favoring free and wide-open debate of important issues between labor and management, stating:

> "We acknowledge that the enactment of Sec. 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management. And, as we stated in another context, cases involving speech are to be considered 'against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks."

Petitioner submits that these decisions are clearly disregarded in the present case, where the Labor Board is permitted and encouraged to find threats and promises where none in fact exist, by gratuitously assuming that an employer threatens to cause a thing to happen if he merely mentions it.

If employers are to be prohibited from mentioning the negative aspects of unionization, on the ground that to mention is to threaten, then the policy favoring free debate must necessarily be defeated, and workers are fated to vote in representation elections in ignorance of the realities involved. As the present decision stands, it makes no difference if the employer indicates no intention to influence events so as to bring the adverse possibility about, or even that he affirmatively disavows any such intention, as in the matter of cutting wages to the legal minimum which is

involved here. The question of violation is made to depend, not on what the employer says or does, but upon what the employee might assume.

Petitioner submits that the employer expressions involved here, admittedly and in indisputable fact, did not contain the threats or promises referred to in Sec. 8(c), and that the subject decision is therefore in conflict with the cited decisions of this Court.

A similar conflict between the instant decision and the existing decisions of other Circuit Courts of Appeal is equally clear.

The Second Circuit Court of Appeals holds squarely that an employer's discussion of the possible adverse consequences of unionization cannot be held the equivalent of a threat to produce such consequences. In *N.L.R.B. v. Golab Corp.*, 388 F. 2d 921 (1967), that Court stated:

> "In holding the passages we have cited to be violations, the Trial Examiner stated simply that 'the letters and speech . . . were calculated to create and instill in the minds of employees a fear of loss of privileges and economic suffering as a result of their adherence to the Union, and constitute interferences, restraint and coercion within the meaning of Section 8(a) (1) of the Act.' This is reading the Act as if §8(c) did not exist; while there is a risk that an employer's predictions of adverse consequences from unionization may be taken as a threat to produce them, to hold that this danger alone suffices to convert a prediction into a threat of reprisal would go back to the very

> position of the early 1940's which §8(c) was adopted to change . . . Only if respondent's words contained a 'threat of reprisal' did they go beyond the bounds of §8(c)."

The rule obtaining in the Ninth Circuit is the same, and was expressed as follows in *N.L.R.B. v. TRW Semiconductors, Inc.*, 385 F.2d 753 (1967):

> "The mere fact that campaign propaganda may induce fear — does not deprive it of the protection of section 8(c). That is the nature of campaign propaganda."

The Court of Appeals for the Eighth Circuit agrees, and holds that an employer's statements to the effect that he is not required to make concessions in bargaining and that the employees are not assured of coming out of bargaining with any particular wages, hours or working conditions, is lawful. In *N.L.R.B. v. Wilson Lumber Co.*, 355 F.2d 426 (1966), that Court, in commenting upon such an employer statement, said:

> "Wilson also expressed his intentions regarding the important matter of bargaining with the union. . . . Respondent recognized that if the union were successful, it would be required to enter into sincere good faith negotiations with the union, but would not be compelled to accede to Union demands. . . . It should be stressed that the Respondent did not, in the handbill and speeches, intimate that it would not bargain in good faith with the union, . . ."

The Seventh Circuit Court of Appeals also holds that that the line between lawful argument and unlawful threats is the line between statements suggesting that the employer will affirmatively seek to thwart unionization by visiting economic disadvantages upon his employees and statements which merely remind the employees of those disadvantages which sometimes flow from unionization itself, the latter type of statement being immune from the ban of Sec. 8(a) (1) and protected by the free speech provision of Sec. 8(c) (Mallory & Co., v. N.L.R.B., 389 F.2d 704 (1967)).

It is thus apparent that the decision as to which review is sought is in direct conflict with the decisions of at least four other Circuit Courts of Appeal, on the same important subject.

Petitioner submits that the National Labor Relations Act was never intended as a device by which meaningful debate on all relevant issues prior to a representation election would be foreclosed, and that the Congress never intended that employees should be deprived of pertinent information relating to unionization. And it is obvious that there can be no meaningful argument if the employer, who alone may be expected to discuss these matters, is foreclosed from talking about the disadvantages that can, and often do, come to unionized employees.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a printed copy of the foregoing Petition for Writ of Certiorari and Appendixes thereto has this day been served by airmail first class, return receipt requested, on the following counsel at the addresses listed below:

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Dated at Miami, Florida, this 17 day of July, 1969.